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5 **UNITED STATES DISTRICT COURT**
6 **DISTRICT OF NEVADA**
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2:13-CR-106 JCM (PAL)

8 UNITED STATES OF AMERICA,

9 Plaintiff(s),

10 v.

11 JAMES GARNER,

12 Defendant(s).
13

14 **ORDER**

15 Presently before the court is the report and recommendation of Magistrate Judge Peggy Leen
16 (doc. # 31) regarding defendant James Garner's motion to suppress (doc. # 23). The government
17 filed an objection to the report and recommendation (doc. # 35), and defendant filed a response (doc.
18 # 36).

19 **I. Background**

20 The incident arises out of a search that was conducted by two members of the Las Vegas
21 Metropolitan Police Department. On the night of March 5, 2013, Officers Bowman and Valle were
22 on patrol and received a call to assist a fellow officer in apprehending a fleeing suspect. The suspect
23 was described as a black male wearing dark clothing. The officers drove their marked patrol car to
24 the Siegel Suites on Teddy and Sahara, located about four-tenths of a mile from the location where
25 the fleeing suspect had last been seen. According to the officers, when they drove past the alley
26 behind the Siegel Suites, they observed an individual seated in the driver's seat of a PT Cruiser who
27 was slumped down, as if to avoid being seen. The PT Cruiser was legally parked in a parking spot
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1 at the time.

2 After using their spotlight to get a clear view inside the vehicle, the officers observed that the
3 individual in the driver's seat, who would later identify himself as James Garner, was a black male
4 wearing dark clothing. Upon seeing this, the officers brought their patrol car to a stop in a way that
5 partially blocked the front of the vehicle and activated their emergency lights. Both officers then
6 approached Garner, and Officer Bowman asked if Garner would be willing to speak to him. As
7 Officer Bowman approached the car, he reportedly saw Garner reach toward his waistband.
8 Immediately after seeing this, Officer Bowman drew his weapon and ordered Garner to get out of
9 the vehicle. Garner complied, and Officer Valle quickly patted him down and discovered a handgun
10 as well as a small amount of marijuana.

11 On March 20, 2013, a grand jury returned an indictment charging Garner with a single count
12 of possessing a firearm as a convicted felon in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).
13 On August 5, 2013, defendant filed a motion to suppress. (Doc. # 23). Defendant argued that the
14 officers lacked reasonable suspicion for an investigatory detention, as defendant was merely sitting
15 in his car, which was legally parked at the time of the incident. Thus, defendant argues that all
16 evidence derived from the unlawful search must be suppressed as tainted fruit of a Fourth
17 Amendment violation.

18 The government responded. (Doc. # 25). The government argued that no requisite level of
19 suspicion was required for the officers to merely question Garner, and that seeing him reach into his
20 waistband created reasonable suspicion for a search. Additionally, the government argued that
21 because Garner was in the general vicinity in which the fleeing suspect was last seen, met the generic
22 description of that suspect, and was slumped down while sitting in his car, they had reasonable
23 suspicion to carry out a search.

24 Magistrate Judge Leen, upon considering the totality of the circumstances, found that a
25 reasonable person would not have felt at liberty to ignore the officers, and thus concluded that Garner
26 had been seized within the meaning of the Fourth Amendment even prior to the officers' exiting their
27 patrol car. Magistrate Judge Leen also found that the circumstances did not create reasonable
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1 suspicion that Garner had committed a crime, and thus the pat down search was not warranted. Thus,
2 the magistrate judge recommended that the district court grant Garner’s motion to suppress.

3 **II. Legal standard**

4 A party may file specific written objections to the findings and recommendations of a United
5 States magistrate judge made pursuant to Local Rule IB 1–4. 28 U.S.C. § 636(b)(1)(B); D. Nev. LCR
6 IB 3–2. Upon the filing of such objections, the district court must make a de novo determination of
7 those portions of the report to which objections are made. *Id.* The district court may accept, reject,
8 or modify, in whole or in part, the findings or recommendations made by the magistrate judge. 28
9 U.S.C. § 636(b)(1)©; D. Nev. IB 3–2(b). However, the district court need not conduct a hearing to
10 satisfy the statutory requirement that the district court make a “de novo determination.” *United States*
11 *v. Raddatz*, 447 U.S. 667, 674 (1980) (observing that there is “nothing in the legislative history of
12 the statute to support the contention that the judge is required to rehear the contested testimony in
13 order to carry out the statutory command to make the required ‘determination’ ”). Rather, a hearing
14 is required only when the district court “reject[s] a magistrate judge’s credibility findings made after
15 a hearing on a motion to suppress.” *United States v. Ridgway*, 300 F.3d 1153, 1154 (9th Cir. 2002).

16 **III. Discussion**

17 The court limits its analysis to a de novo review of the portions of the report to which
18 objections were made. *See* 28 U.S.C. § 636(b)(1)(B). The government’s objections to the report are
19 the same arguments it presented in its response to the motion to suppress. The government argues
20 that the officers’ initial questioning of Garner did not require reasonable suspicion, and that the
21 officers certainly had reasonable suspicion to search Garner at the time they saw him reach toward
22 his waistband. The government also argues that the officers reasonably suspected that Garner had
23 committed a crime due to his presence in the area where a suspect had recently fled, the fact that he
24 matched the description of the fleeing suspect, and Garner’s act of “slumping down” while sitting
25 in his car.

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1 First, the government argues that reasonable suspicion was not required at the point that the
2 officers began questioning defendant. While the government is correct that police officers asking
3 questions of an individual in a public place does not necessarily require Fourth Amendment scrutiny,
4 *see Florida v. Royer*, 460 U.S. 491, 497 (1983), reasonable suspicion is required for police to
5 question an individual when their actions restrain the individual's liberty "such that a reasonable
6 person would have believed he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544,
7 555 (1980). Indeed, for officers to hold an individual, even briefly, for an investigatory stop, they
8 must have a reasonable suspicion supported by specific and articulable facts that suggest the suspect
9 is engaged in criminal activity. *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

10 The government asserts that no investigatory stop occurred in this case because the officers
11 merely approached Garner and asked him if he would be willing to answer a few questions. The
12 government also cites to Ninth Circuit authority indicating that a situation in which officers partially
13 blocked a car that a suspect was sitting in did not constitute an investigatory stop. *See United States*
14 *v. Kim*, 25 F.3d 1426, 1430 (9th Cir. 1994).

15 While the government is correct that the officers' act of stopping their patrol car in a way that
16 partially blocked Garner's car from moving forward may not, by itself, have turned the situation into
17 an investigatory stop, the court finds that the totality of the circumstances indicate that a seizure
18 occurred. In addition to partially blocking Garner's car from moving forward, the officers activated
19 the patrol car's emergency lights before exiting the vehicle and asked Garner if he would be willing
20 to answer a few questions.¹

21 At the time, Garner very likely thought that the officers intended to place their car in a way
22 that impeded his movement, and the activation of the emergency siren was an additional signal that
23 the police were asserting their authority as officers of the law. Given these circumstances, a
24 reasonable person would not feel that they could simply ignore the officers, and would certainly
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26 ¹ The government argues, and this court agrees, that activating a patrol car's lights in and of itself does not
27 convert what would otherwise be a voluntary conversation with police into an investigatory stop. However, in this
28 particular instance, the additional details of the circumstance turned this encounter into one in which a reasonable person
would not have felt free to leave.

1 believe that they were not free to leave. Accordingly, this court agrees with the magistrate judge's
2 conclusion that an investigatory stop took place prior to asking Garner if he would be willing to
3 answer their questions.

4 Thus, if the officers did not have reasonable suspicion at the time they partially blocked
5 Garner's car and activated their patrol car's emergency lights, their investigatory stop of Garner was
6 performed in violation of the Fourth Amendment. Evidence obtained as a result of a violation of the
7 Fourth Amendment must be suppressed as "fruit of the poisonous tree." *Wong Sun v. United States*,
8 371 U.S. 471 (1963).

9 The Supreme Court has characterized reasonable suspicion to be "more than an inchoate and
10 unparticularized suspicion or hunch," yet "considerably less than proof of wrongdoing by a
11 preponderance of the evidence standard." *United States v. Sokolow*, 490 U.S. 1, 7 (1989); *see also*
12 *Terry*, 392 U.S. at 27. Moreover, the officer's basis for suspicion must be particularized and
13 objective. *United States v. Thomas*, 211 F. 3d 1186, 1189 (9th Cir. 2000); *see also Illinois v.*
14 *Wardlow*, 528 U.S. 119 (finding that reasonable suspicion is based largely on common sense
15 judgments and human inferences by the investigating officer). Officers have reasonable suspicion
16 when "specific, articulable facts . . . together with objective and reasonable inferences, form the basis
17 for suspecting that the particular person detained is engaged in criminal activity." *United States v.*
18 *Choudhry*, 461 F.3d 1097, 1105 (9th Cir. 2006) (internal quotation marks omitted). The reasonable
19 suspicion analysis takes into account the totality of the circumstances. *United States v. Montero-*
20 *Camargo*, 208 F.3d 1122, 1129 (9th Cir. 2000) (en banc).

21 In this case, the specific facts articulated by Officers Bowman and Valle did not give rise to
22 "reasonable suspicion" which would have permitted the initial investigatory stop. The basis for
23 suspicion articulated by the officers consisted of the following facts: (1) Garner was found sitting
24 in a car that was within half a mile of the location in which a fleeing suspect had last been seen; (2)
25 Garner matched the description of "a black man wearing dark clothing"; and (3) Garner "slumped
26 down" while sitting in the driver's seat of his car.

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1 Even taken together, all of these facts would not create reasonable suspicion that Garner had
2 committed, was committing, or was about to commit a crime. In fact, the first two of these
3 foundations are so vague that they could have likely described dozens of individuals on that
4 particular night. Even considering these factors in combination with the officers' general
5 observations about Garner's posture as he sat in his car which was legally parked beside the Siegel
6 Suites does not raise a reasonable inference that he was involved in criminal activity, and only
7 suggests that he may have been drowsy or waiting for someone staying in the building.

8 Even though the officers ended up discovering contraband in their search, the fact that the
9 investigatory stop was not warranted in the first instance indicates that the evidence discovered in
10 the pat down was nothing more than "the fruit of the poisonous tree." Accordingly, the evidence
11 must be suppressed. Therefore the court agrees with the findings of the magistrate judge and will
12 grant defendants' motion.

13 **IV. Conclusion**

14 Accordingly,

15 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the report and
16 recommendation of Magistrate Judge Peggy Leen (doc. # 31) regarding defendant James Garner's
17 motion to suppress (doc. # 23) be, and the same hereby is, ADOPTED in its entirety.

18 IT IS FURTHER ORDERED that defendant James Garner's motion to suppress (doc. # 23)
19 be, and the same hereby is, GRANTED.

20 DATED December 12, 2013.

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23 **UNITED STATES DISTRICT JUDGE**
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